

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

VICENTICO P. RIOJA, JR., LUCY S.
RIOJA,

2:09-CV-628 JCM (PAL)

Plaintiffs,

V.

LINEAR FINANCIAL, LP DBA
PARDEE HOME LOANS, et al..

Defendants.

ORDER

16 Presently before the court is a motion to dismiss plaintiffs' complaint filed by defendants
17 Linear Financial, NA ("Linear") and Wells Fargo Bank, NA ("Wells Fargo"). Doc. #4.

18 Plaintiffs Vicentico P. Rioja Jr. and Lucy S. Rioja obtained a loan from defendant Linear in
19 March, 2008. Doc. #4. Linear assigned the deed of trust to defendant Wells Fargo. *Id.* Plaintiffs
20 defaulted on the loan, and Wells Fargo recorded a notice of default against the property. *Id.*
21 Subsequently, plaintiffs filed the instant action against defendants alleging: (1) unfair lending
22 practices; (2) negligence; (3) negligence per se; (4) breach of fiduciary duty; (5) negligent
23 misrepresentation; (6) intentional misrepresentation; (7) breach of the covenant of good faith and fair
24 dealing; and (8) wrongful foreclosure. Doc. #1, exhibit A.

25 On April 14, 2009, defendants filed the present motion to dismiss. Doc #4. Plaintiffs'
26 response was due by May 4, 2009. No response has been filed.

1 Nevada LR 7-2(d) provides in pertinent part that “[t]he failure of an opposing party to file
 2 points and authorities in response to any motion shall constitute a consent to the granting of the
 3 motion.” However, failure to file an opposition to a motion to dismiss is not cause for automatic
 4 dismissal. *See Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). “Before dismissing the action, the
 5 district court is required to weigh (1) the public’s interest in expeditious resolution; (2) the court’s
 6 need to manage its docket; (3) the risk of prejudice; (4) the public policy favoring disposition of
 7 cases on their merits; and (5) the availability of less drastic sanctions.” *Id.* (quoting *Henderson v.*
 8 *Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986)).

9 Here, those factors weigh toward dismissal. The public’s interest in expeditious resolution
 10 of litigation, the court’s need to manage its docket, and the lack of prejudice weigh in favor of
 11 granting the motion to dismiss. Additionally, the motion has merit.

12 A court may dismiss a plaintiff’s complaint for “failure to state a claim upon which relief can
 13 be granted.” FED. R. CIV. PRO. 12(B)(6). A 12(b)(6) motion is a test of the complaint’s sufficiency
 14 in establishing the grounds for relief. *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th
 15 Cir. 1983).

16 Plaintiffs’ complaint fails to state a claim upon which relief can be granted. Plaintiffs’
 17 allegations require a breach of a fiduciary duty owed by the defendants. However, there is no
 18 fiduciary duty between a lender and a borrower involving home loans. *See Yerington Ford, Inc. v.*
 19 *Gerard Motors Acceptance Corp.*, 359 F.Supp.2d 1075, 1092 (D. Nev. 2004). Absent any fiduciary
 20 duty, there can be no breach. *See A.C. Shaw Constr. v. Washoe County*, 784 P.2d 9, 10 (Nev. 1989).

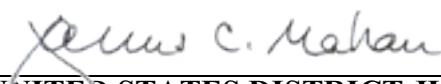
21 Moreover, plaintiffs’ allegations of defendants’ misrepresentations are not pled with
 22 sufficient particularity to satisfy Fed. R. Civ. P. 9. The complaint fails to allege the requisite who,
 23 what, where, when, and how. *See Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 550 (8th Cir. 1997).
 24 Instead, plaintiffs’ complaint simply states that the defendants had a duty to make accurate, truthful,
 25 and complete representations to them relating to the loan, and that the defendants failed to do so.

26 Finally, plaintiffs’ claim for wrongful disclosure also fails to state a claim upon which relief
 27 can be granted. Under Nevada law, a beneficiary like Wells Fargo may initiate a non-judicial

1 foreclosure upon default of the borrowers (the plaintiffs, in this case). *See* NRS § 107.080. Linear
2 lawfully assigned the deed of trust to Wells Fargo, and Wells Fargo initiated non-judicial foreclosure
3 proceedings upon plaintiffs' default. Doc #4. Therefore,

4 IT IS ORDERED, ADJUDGED AND DECREED that the present motion to dismiss (Doc.
5 #4) is GRANTED. Plaintiffs' complaint is dismissed without prejudice.

6 DATED this 8th day of June, 2009.

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8 **UNITED STATES DISTRICT JUDGE**
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